IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2016-WC-00396-COA

ALESHIA DIETZ **APPELLANT**

v.

SOUTH MISSISSIPPI REGIONAL CENTER AND MISSISSIPPI STATE AGENCIES WORKERS' COMPENSATION TRUST **APPELLEES**

DATE OF JUDGMENT:	03/01/2016
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEYS FOR APPELLANT:	JAMES KENNETH WETZEL GARNER JAMES WETZEL
ATTORNEY FOR APPELLEES:	JEFFREY STEPHEN MOFFETT
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIBUNAL DISPOSITION:	WORKERS' COMPENSATION BENEFITS DENIED
DISPOSITION:	REVERSED, RENDERED, AND REMANDED – 04/11/2017
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

IRVING, P.J., FOR THE COURT:

¶1. On June 30, 2015, an administrative judge (AJ) ruled in favor of Aleshia Dietz, finding that she was not time-barred from asserting her claim to continue receiving medical benefits from her employer, South Mississippi Regional Center (Employer), because Employer had previously paid her wages in lieu of compensation, thereby tolling the two-year statute of limitations. On March 1, 2016, the Workers' Compensation Commission (Commission) reversed the AJ's ruling, finding that Dietz's claim was time-barred because she was not paid wages in lieu of compensation and, therefore, the statute was not tolled;

thus, her failure to file a claim within two years precluded her from recovering additional benefits. Dietz now appeals, arguing that she did not file a formal claim within two years of her injury because she relied on assurances from Mississippi State Agencies Workers' Compensation Trust (Carrier) that it would "take care of everything." Dietz argues that the Employer/Carrier should be estopped from asserting the statute of limitations as a defense.

¶2. We reverse and render and remand to the Commission for further proceedings.

FACTS

¶3. In May 2011, Dietz began working as a nurse for Employer. She worked twelve-hour shifts on a "rotating schedule."[1] Dietz's shifts involved caring for twenty to twenty-four patients, which required some moderate physical activity. On January 10, 2012, Dietz was involved in a car accident while running an errand for work.[2] Dietz immediately reported the accident to her supervisor. Later that evening, Dietz reported that she was feeling some pain in her neck and back. She filled out the requisite paperwork and saw a nurse practitioner the following day. In April 2012, Dietz began seeing Dr. Eric Wolfson, who recommended that Dietz visit a chiropractor three to four times a week; Dietz began doing so on August 23, 2012. Dietz maintains that, post-injury, she continued to work for Employer in a "modified, light duty position." Because Dietz continued working, Employer/Carrier did not pay her

[1] In other words, one week, Dietz might work Wednesday through Sunday and have off Monday and Tuesday, while the next week, she might work Monday through Friday and have off Saturday and Sunday.

[2] Employer/Carrier admits that Dietz's injury was compensable under workers' compensation law.

workers' compensation indemnity benefits; however, Employer/Carrier did authorize and pay for Dietz to receive medical treatments and attend medical appointments pertaining to her injury.

¶4. In March 2012, Dietz first met with Alice Posey, the adjuster for Carrier. Dietz asserts that she expressed concerns to Posey about how to proceed with her claim because this was her first experience with workers' compensation; however, Posey assured Dietz "not to worry because she would take care of everything." When Dietz asked Posey whether she should hire an attorney, Posey told her there was no need because she was "going to take care of it all." Posey authorized payment of all of Dietz's medical expenses. Furthermore, Posey even assigned a nurse case manager to Dietz's claim, who scheduled and attended all of Dietz's injury-related medical appointments.

¶5. Dietz maintains that she ultimately missed a substantial amount of work as a result of these medical treatments and appointments; at trial, Dietz testified that she often took full days off for medical appointments, and sometimes took off a day or more at a time when she had epidurals to her neck performed. Dietz further contended that she missed work as a result of migraine headaches brought on by her injury. Dietz filled out various leave-of-absence forms for the days that she missed work.[3] Dietz conceded at trial that she "obviously . . . kept terrible records" during this time because she was unsure what to write on the forms;

[3] Dietz testified at trial that Employer did not require employees to specify their reasons for taking leave.

for example, sometimes she would write "comp."[4] or "fmla" on the forms, while other times she marked "medical" as the reason for taking leave or just did not specify at all. Ultimately, however, when asked how many days she had off during the calendar years 2012, 2013, and 2014, Dietz replied, "There's been so many I couldn't guess."

¶6. Dietz testified that despite all of these absences, her salary never decreased. Dietz speculated that she must have run out of her allotted leave time at some point; however, Employer's human-resources manager testified that, to her knowledge, Dietz never exceeded her leave time. Dietz testified that Employer/Carrier paid for her medical appointments without issue for two years from the date of Dietz's injury, and that at no point prior to January 13, 2014, did they represent that they planned to cease payment of Dietz's medical treatment. Dietz testified that on January 13, 2014, she attended an appointment with Dr. Wolfson, who "recommended additional cervical epidural injections, physical therapy again for three to four weeks and [a] follow-up in four to six weeks." Dietz testified that her Carrier-assigned nurse case manager attended this appointment, yet never indicated that Carrier was about to cease payment of Dietz's medical treatment.

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[4] "Comp." does not necessarily refer to workers' compensation; rather, it refers to the employees' use of their allotted compensation time; in late 2012, Employer began a scheduling format wherein employees accumulated "comp." time rather than overtime pay. Dietz testified at trial that if an employee did not work the required number of hours for that pay period, Employer would deduct those hours from the employees' bank of "comp." time. The same holds true for the time period before Employer switched to a different scheduling format: Employer would deduct leave time from the employees' allotted amount if employees did not work their required number of hours in a pay period.

¶7. In mid-January, shortly after her January 13, 2014 appointment with Dr. Wolfson and more than two years after Dietz initially sustained her injury, Dietz received a letter from Employer/Carrier in which Employer/Carrier declared that it would no longer pay for Dietz's injury-related medical treatment because Dietz had failed to file a formal claim within the applicable two-year statute of limitations. Dietz maintains that she was shocked by this letter, as she had received no indication that Employer/Carrier was planning to suspend her benefits. Dietz immediately retained legal counsel and filed a petition to controvert on January 16, 2014.

¶8. On June 30, 2014, an AJ conducted a hearing wherein Dietz testified that she was led to believe that she did not need to file a formal claim because of Posey's assurances that it was all being taken care of. The AJ ultimately held for Dietz, finding that Employer/Carrier's "voluntary payment of salary in lieu of compensation or its payment of medical benefits within two years after the date of injury waived the [necessity for] filing of a formal claim within that period." The AJ also reasoned that Carrier had assured Dietz that she did not need to take action to enforce her right to benefits, and that Dietz relied on those assurances to her detriment. The AJ held that Employer/Carrier was therefore estopped from asserting the statute of limitations as a defense.

¶9. Feeling aggrieved, Employer/Carrier appealed the AJ's order to the Commission. On March 1, 2016, the Commission reversed the AJ's order, finding that Employer/Carrier's payment of Dietz's medical benefits did not constitute wages in lieu of compensation; thus,

the two-year statute of limitations was not tolled and Dietz was barred from continuing to receive benefits. Additionally, the Commission rejected the AJ's ruling that payment of medical benefits in the two years after the date of injury waived the necessity for filing a formal claim. Dietz filed a timely notice of appeal.

DISCUSSION

¶10. This Court's review in workers' compensation cases "is limited to determining whether the Commission's decision was supported by substantial evidence, was arbitrary and capricious, was beyond the scope or power of the agency to make, or violated . . . constitutional or statutory rights." *Pulliam v. Miss. State Hudspeth Reg'l Ctr.*, 147 So. 3d 864, 868 (¶16) (Miss. Ct. App. 2014) (internal citations and quotations omitted). "Our supreme court has also stated the Commission will only be reversed 'for an error of law or an unsupportable finding of fact.'" *Smith v. Johnston Tombigbee Furniture Mfg. Co.*, 43 So. 3d 1159, 1164 (¶15) (Miss. Ct. App. 2010). "When the Commission's decision is supported by substantial evidence, then it must be upheld. This remains true even though we might have reached a different conclusion were we the trier of fact." *Parker v. Ashley Furniture Indus.*, 164 So. 3d 1081, 1083-84 (¶11) (Miss. Ct. App. 2015) (citations omitted). However, issues of law, including matters involving statutes of limitations, will be reviewed de novo. *Ladner v. Zachry Constr.*, 130 So. 3d 1085, 1088 (¶9) (Miss. 2014). Additionally, "when the agency has misapprehended a controlling legal principle, no deference is due, and our review is de novo." *ABC Mfg. Corp. v. Doyle*, 749 So. 2d 43, 45 (¶10) (Miss. 1999).

¶11. As stated, Dietz argued before the AJ—and the AJ agreed—that the two-year statute of limitations had been tolled because she was paid wages in lieu of compensation, based on the fact that she continued to receive her entire salary for the two years following her injury and her paycheck never varied despite missing a "substantial" amount of work to receive medical treatment pertaining to that injury. Dietz also argued—and the AJ agreed—that the Employer/Carrier should be estopped from asserting the two-year statute of limitations as a bar because she had relied on the Employer/Carrier's repeated assurances and representations that it would take care of everything.

¶12. Employer/Carrier argued—and the Commission agreed—that Dietz was not paid wages in lieu of compensation, based on the fact that Dietz enjoyed a flexible work schedule, which could have allowed her to schedule and attend medical appointments on days when she was not working. The Commission also rejected the finding of the AJ that the Employer/Carrier was estopped from asserting the two-year statute-of-limitations bar, finding instead "that the overwhelming weight of [Deitz's] testimony does not establish that the adjuster's statements misled or prevented [Dietz] from taking action on her claim." In support of its conclusion, the Commission then inserted a footnote, which states: "To the contrary, [Dietz's] counsel signed and dated the Petition to Controvert on the two-year anniversary of the injury date; it was just not filed with the Commission prior to the expiration of the two-year period."

¶13. Dietz's notice of appeal states, in relevant part: "Diet [sic], feeling aggrieved by the

[d]ecision of the Commission, dated March 1, 2016, desires to appeal said [d]ecision and [o]rder of the Mississippi Workers' Compensation Commission to the Mississippi Supreme Court." In her appeal, Dietz states the issue as follows: "The Commission erred as a matter of law and fact in reversing the administrative . . . judge as same is arbitrary and capricious and not supported by substantial evidence and contrary to law and should be reversed and remanded."[5]

¶14. Dietz argues that she did not file a formal claim within two years after her injury because she relied on multiple reassurances from Employer/Carrier's adjuster that it would "take care of everything," and that the Commission's finding to the contrary is not supported by substantial evidence. We agree. As stated, in addressing this argument, the Commission found "that the overwhelming weight of [Deitz's] testimony does not establish that the adjuster's statements misled or prevented [Dietz] from taking action on her claim."

¶15. We readily acknowledge that the Commission is the fact-finder, and as stated, our review is limited to a determination of whether the Commission's finding is supported by substantial evidence. So we look at the evidence. First, Dietz's testimony that she was repeatedly assured by the Employer/Carrier adjuster Posey that Employer/Carrier would take care of everything and that she did not need an attorney is not contradicted. Employer/

[5] While Dietz's stated issue in this appeal covers the entirety of the Commission's decision, which addressed two issues—whether Dietz had been paid wages in lieu of compensation and whether Employer/Carrier was estopped from asserting the two-year statute-of-limitations bar—she has briefed only the estoppel issue. Therefore, we will limit our discussion to that issue.

Carrier did not offer Posey to rebut Dietz's testimony. Second, Posey assigned a case manger to Dietz, and the case manager made, and attended, all of Dietz's medical appointments. Third, on January 13, 2014, three days after the expiration of the two-year statutory period for filing a petition to controvert, Employer/Carrier paid for medical expenses incurred by Dietz for her work related-injury.

¶16. We turn to the Commission's finding. What is the testimony, given by Dietz, that the Commission found to show overwhelmingly that Dietz did not rely on the assurances and representations of the Employer/Carrier that it would take care of everything? We quote the relevant portion of the Commission's order:

> Lastly, the Order of Administrative Judge makes mention of Claimant's testimony regarding her interaction with the Adjuster for the Employer/Carrier. A closer look at Claimant's testimony reveals that in early March of 2012, the adjuster told Claimant that "she would take care" of compensation and medical benefits owed to Claimant. . . . Claimant further testified that she received similar assurances throughout the time of her medical care. However, Claimant testified during cross-examination that after her doctor's appointment on December 19, 2013, there were no assurances made by the Carrier nor discussions concerning her need for legal counsel in the claim. . . .The Commission finds that the overwhelming weight of Claimant's testimony does not establish that the adjuster's statements misled or prevented Claimant from taking action on her claim.

The Commission, however, overlooked the rest of Dietz's testimony that she gave during direct examination, all of which was uncontradicted:

> Q. Now, your conversation with Ms. Posey leading up - - you went through 2012, 2013. You were dealing directly with your adjuster?
>
> A. Yes, sir.

Q. You had no attorney --

A. No.

Q. What was she telling you through [the] 2012, 2013 period leading up to January 2014 in reference to whether you needed an attorney, whether or not -- what she was going to do for you, et cetera?

A. She continued to tell me to just not worry about anything. She was going to take care of it all. That, you know, I didn't need to get -- I didn't need to worry about anything. That it was all going to be taken care of. Not to, you know, get any attorney, not to worry about anything.

Q. Okay. It looks like the last -- January 13, 2014, you went [in to see] Dr. Wolfson. That would have been right at two years --

A. Uh-huh.

Q. -- two years and a couple of days --

A. Yes, sir.

Q. -- three days. Workman's comp paid for that visit?

A. Yes, sir.

Q. And at that visit, Dr. Wolfson recommended additional cervical epidural injections, physical therapy again for three to four weeks and follow-up in four to six weeks?

A. Yes, sir.

Q. Is that at the point where Ms. Posey -- you had conversations with Ms. Posey regarding that treatment?

A. I didn't talk to Ms. Posey. I had a caseworker, and she was talking -- she was taking care of everything. But still, at that point, I was told everything was going to be taken care of.

Q. And what happened at that juncture when that treatment was recommended on the last visit in January?

A. I received a letter that I was -- I was not going to get -- I was not going to be covered anymore.

Q. And was that at the point that you retained my services --

A. Yes, sir.

* * * *

Q. Leading all the way up to that point, was there any indication at all -- did they indicate to you at all that they were not going to cover your medical treatment?

A. No, sir, not at all.

Q. Had you relieved [sic] upon their assertions that they were going to take care of everything?

A. Absolutely.

Q. And did you rely upon their promises even up through January 13th that they were taking care of everything?

A. Yes.

Q. Did it come as a surprise to you?

A. Yeah, I was shocked.

¶17. It is clear to us that the Commission did not consider the totality of Deitz's testimony when it concluded that Dietz was not misled by Posey and that its conclusion was heavily and unduly influenced by the date on the petition to controvert. As proof that Dietz was not misled and knew that she needed to file a petition to controvert by or before January 10,

2014, the Commission stated the following in a footnote:

> It is interesting to note that [Dietz's] counsel signed and dated the Petition to Controvert on January 10, 2014, which is two years from the injury date. This is also prior to the date the Carrier informed [Dietz] that her medical treatment was being denied based upon the two-year limitations period. Apparently [Dietz] realized the need to take action within two years of the injury, but the Petition was mailed to the Commission, and it was not received and filed until January 16, 2014, which is more than two years after the injury date.

The reason the date of the petition is not the smoking gun that the Commission believed it was is this: Dietz testified without contradiction that she did not consult a lawyer until after her doctor's appointment that occurred on January 13, 2014. The dissent correctly points out that there is an employment contract signed, and dated October 8, 2012, by Dietz.[6] We make two observations regarding this fact. First, and of upmost significance, is the fact that the Commission did not mention the contract in its order while discussing the estoppel issue or its reasoning for concluding that Dietz was not misled by Posey. The dissent concedes as much. If indeed the Commission thought that the date of the contract, signed sixteen months before the expiration of the two-year limitations period, was significant to its factual

[6] The dissent takes issue with our statement that Dietz testified without contradiction that she did not consult a lawyer until after her doctor's appointment that occurred on January 13, 2014. Apparently, the dissent's contention is that the dated contract contradicts Dietz's testimony. That may be the case; however, the contract was not admitted as an exhibit during the hearing before the AJ. Therefore, she ***testified*** without contradiction by either witness testimony or documentary evidence. What is more? Even Employer/Carrier agrees that the contract was not made a part of the Commission's record. It is interesting and very notable that Employer/Carrier does not make the contract issue a central part of its argument on appeal. Its only statement about the contract appears on the last page of its brief and is expanded upon in a footnote. Clearly, the contract issue is a red herring.

determination of whether Dietz relied upon Posey's repeated representations that Dietz did not need a lawyer, the Commission's failure to discuss this matter is extremely perplexing. Second, inasmuch as the Commission scrutinized the date of the petition to controvert, it can hardly be reasonably argued that the Commission would not have seen the contract, for it would have been the best evidence to prove that Dietz was being represented by a lawyer, if indeed she was, and not relying on Posey's representations. What is more logical is that Dietz may have initially consulted a lawyer but abandoned that pursuit based on Posey's repeated representations that she did not need one. Viewing the matter from this perspective, it is understandable why the Commission did not discuss the contract. Having initially signed a contract and later abandoning it is not inconsistent with Dietz's testimony that she was repeatedly told that she did not need a lawyer. Apparently, this discernible explanation was not lost on the Commission and is the most logical reason why the Commission did not discuss the contract. The dissent relies on evidence that the Commission apparently did not deem relevant to its decision. We find no reason as to why we should stray from the evidence addressed by the Commission in its order, for its order is the best evidence of what it considered.[7]

¶18. Even if Dietz had consulted a lawyer prior to January 13, 2014, it does not prove that she had been continuously represented by that lawyer up to and including January 10, 2014,

[7] A footnote in Employer/Carrier's brief states that the contract was "not made a part of the Commission['s] record, though it is available as part of their online docket . . . ."

which is the date of the petition to controvert. Why the petition was dated January 10, 2014, and why the contract was dated October 8, 2012, pose questions, the answers to which the attorney for Employer/Carrier did not explore during any of the witnesses' testimony. However, the lack of an answer or conjecture as to what the answer might be cannot constitute substantial evidence that Dietz was not duped by Posey into believing that Dietz did not need to file a petition to controvert and that Dietz did not rely on the assurances and representations made by Posey. Even if Dietz initially contacted or hired a lawyer, it does not prove that she did not abandon that endeavor based on the repeated representations made by Posey. After all, the record is clear that Dietz is not a lawyer, and there is nothing in the record to indicate that she was familiar with workers' compensation law and, therefore, knew of the two-year limitations period for filing a claim. We also note that the payment by Employer/Carrier of Dietz's January 13, 2014 medical bill, an expenditure occurring three days beyond the expiration of the two-year limitations period, is substantial and persuasive evidence supporting Dietz's assertion that she was told by Posey that Employer/Carrier would take care of everything, for it tends to show that Employer/Carrier was doing what it said it would do before deciding otherwise.

¶19. Mississippi law defines the elements of equitable estoppel as: "(1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 492 (¶32) (Miss. 2005). This Court has held the following with respect to

proving equitable estoppel:

> Equitable estoppel requires that one party by its conduct, words, or even silence, make a representation or concealment of material facts. That representation must be with actual or imputed knowledge of the facts and with the intent that the other party rely on the representation because of the party's ignorance of the truth. Finally, damage must proximately result.

Brock v. Hankins Lumber Co., 786 So. 2d 1064, 1067 (¶11) (Miss. Ct. App. 2000). Equitable estoppel should not "be applied so liberally as to allow a plaintiff to assert estoppel where no inequitable behavior is present." *McCrary v. City of Biloxi*, 757 So. 2d 978, 981 (¶13) (Miss. 2000).

¶20. The Mississippi Supreme Court held in *McCrary*, 757 So. 2d at 978 (¶1), that an employer was estopped from asserting the statute of limitations as a defense where the claimant "was misled by the [employer's] representation that it would file his workers' compensation claim for him." In *McCrary*, the employer failed to file the notice required by Mississippi Code Annotated section 71-3-37(4); the court found that while this factor, alone, did not prevent the employer from asserting the statute-of-limitations defense, it was a factor to be considered in conjunction with the fact that the employer told the claimant it would file his claim and that it engaged in settlement negotiations for a substantial period of time. *Id.* at 982 (¶18). The court found that the claimant had "relied on the [employer's] representations to his detriment" and held for the claimant. *Id.*

¶21. Mississippi case law is unclear regarding what constitutes "inequitable behavior." In several instances, this Court and the Mississippi Supreme Court have found that an employer

and carrier were estopped from asserting the statute of limitations where the claimant was led to believe that he had no need to file a formal claim. For example, in *Martin v. L.&A. Contracting Co.*, 162 So. 2d 870, 873 (Miss. 1964), the court found that "[c]laimant's conduct, in refraining from filing a claim as long as he was receiving compensation, was reasonable. He had no occasion to make a claim under the Mississippi [Workers' Compensation A]ct sooner. . . . Voluntary payment of compensation under these circumstances constituted a waiver of formal claim, and rendered claimant's delay reasonable." Additionally, the supreme court has remarked that an employer's continuous reassurances to a claimant that the employer was taking care of filing a formal workers' compensation claim for the claimant served as an "additional consideration" in finding that the claimant's case was not barred by the statute of limitations. *Prentice v. Schindler Elevator Co.*, 13 So. 3d 1258, 1261 (¶8) (Miss. 2009).

¶22. In summary, as informed by the record before us, we find a lack of substantial evidence to support the factual findings of the Commission. A contract, dated October 8, 2012, more than sixteen months prior to the expiration of the two-year limitations period, is not substantial evidence that Dietz was being represented by a lawyer, especially since the contract was not filed with the Commission until January 16, 2014. The more likely explanation for the time gap between the date of the contract and the date of the filing of the contract is that Dietz had abandoned her representation by the lawyer based on the representations made by Posey and that she went back to see him after she learned that

Employer/Carrier was not going to keep its word. While the dissent says we are re-weighing the evidence, it does not explain how we re-weigh evidence that was never weighed by the Commission in its order. Dietz was clear in her testimony that, because of the representation made to her by Posey, she had no reason to believe that she needed to file a formal claim. Especially damning to Employer/Carrier is the fact that Employer/Carrier actually assigned a nurse case manager to schedule and attend each of Dietz's medical appointments pertaining to her work-related injury. The nurse case manager, who never once told Dietz that her benefits would cease to continue if she did not formally file a claim, not even on January 13, 2014, at Dietz's last medical appointment, which was two years and three days past the date of Dietz's injury. Yet Employer/Carrier paid for this medical appointment. Thus, we find that Employer/Carrier is now estopped from arguing the statute of limitations as a defense.

¶23. The judgment of the Commission is reversed and rendered, as we find that Dietz's claim is not barred by the two-year statute of limitations. Therefore, we remand this case to the Commission for further proceedings.

¶24. THE JUDGMENT OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS REVERSED AND RENDERED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.

LEE, C.J., GREENLEE AND WESTBROOKS, JJ., CONCUR. BARNES AND FAIR, JJ., CONCUR IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. WILSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY GRIFFIS, P.J., ISHEE AND CARLTON, JJ.; FAIR, J., JOINS IN PART.

WILSON, J., DISSENTING:

¶25. The Commission's decision is supported by substantial evidence and should be affirmed. Accordingly, I respectfully dissent.

¶26. Dietz argues that the employer/carrier are equitably estopped from raising the statute of limitations as a defense because the carrier's adjuster repeatedly assured Dietz that she would "take care of everything," and the carrier continued sending a nurse case manager to accompany Dietz to doctor's appointments and continued paying her medical bills. Relevant to this issue, Dietz testified, and her medical records show, that she went to an appointment with Dr. Wolfson on January 13, 2014, and Dr. Wolfson recommended additional treatment. Dietz then testified as follows:

> Q. And what happened at that juncture when that treatment was recommended on the last visit in January?
>
> A. I received a letter that I was -- I was not going to get -- I was not going to be covered any more.
>
> Q. And was that at the point that you retained my services --
>
> A. Yes, sir.
>
> Q. -- to represent you, and I filed the necessary paperwork.
>
> A. Yes, sir.

Hearing Tr. 21. In her brief on appeal, Dietz repeats this claim, stating:

> Dietz testified that on her last appointment, which the workers' comp carrier paid for, with Dr. Wolfson on January 13, 2014, two years and a couple of days after her injury, Dr. Wolfson recommended another injection. Following that appointment she was sent a letter stating that she would no longer be covered by worker[s'] comp. (TR. p. 21). *After receiving that letter she immediately hired her current attorney.* (TR p. 21).

Appellant's Br. 7 (emphasis added).

¶27. The Commission directly addressed this argument in its order, stating as follows:

> The Commission finds that the overwhelming weight of [Dietz's] testimony does not establish that the adjuster's statements misled or prevented [Dietz] from taking action on her claim. To the contrary, [Dietz's] counsel signed and dated the Petition to Controvert on the two-year anniversary of the injury date; it was just not filed with the Commission prior to the expiration of the two-year period. . . . [T]he Commission finds that the facts . . . do not support a finding . . . that the statements of the adjuster induced [Dietz] to take no action.

Dietz v. S. MS Reg'l Ctr., MWCC No. 14 00424-M-5350, 2016 WL 928034, at *4 & n.2 (Miss. Work. Comp. Comm'n Mar. 1, 2016). The Commission's order also stated:

> It is interesting to note that [Dietz's] counsel signed and dated the Petition to Controvert on January 10, 2014, which is two years from the injury date. *This is also prior to the date the Carrier informed [Dietz] that her medical treatment was being denied based upon the two-year limitations period.* Apparently [Dietz] realized the need to take action within two years of the injury, but the Petition was mailed to the Commission, and it was not received and filed until January 16, 2014, which is more than two years after the injury date.

Id. at *1 n.1 (emphasis added).

¶28. Thus, the Commission obviously did not find credible Dietz's testimony that the carrier's assurances induced her to take no action on her claim. The Commission simply found that Dietz's testimony did not add up. Dietz's petition to controvert was signed and dated by her attorney three days prior her visit to Dr. Wolfson, which was before she claimed that she received notice of termination of her medical benefits.

¶29. The lead opinion states that "Dietz testified without contradiction that she did not consult a lawyer until after her doctor's appointment that occurred on January 13, 2014."

Ante at (¶17). Respectfully, I disagree. Although not mentioned in the Commission's order, Dietz's attorney also filed a representation agreement that both Dietz and the attorney signed on October 8, 2012—fifteen months *before* Dietz claims she first consulted with a lawyer.[8] Thus, Dietz was, at best, mistaken by a matter of fifteen months when she testified that she did not hire an attorney until after the statute had run and after she received notification that her benefits were terminated. As noted above, Dietz repeats this claim on appeal—that "she immediately hired her current attorney" after receiving a letter in January 2014—even though the record shows that she hired the attorney in October 2012.

¶30. This testimony by Dietz was essential to her estoppel claim. Given that Dietz was, at best, mistaken about this critical sequence of events, I cannot say that the Commission made "an unsupportable finding of fact" in finding that the carrier's assurances did not induce Dietz to take no action. *See Ga. Pac. Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991) ("This Court will overturn a Commission decision only for an error of law or an

[8] This agreement was filed in January 2014 with the petition to controvert. The month and day are handwritten; the year is typed. The contract specifically states that the representation concerns the January 10, 2012 injury. The file-stamped contract is at pages 9 and 10 of the certified volume of pleadings that this Court received from the Workers' Compensation Commission as part of the record on appeal. Both Dietz and her lawyer signed the contract, and her lawyer filed it with the Commission. The lead opinion states: "Apparently, the dissent's contention is that the dated contract contradicts Dietz's testimony." *Ante* at n.6. That is not a "contention." The document objectively contradicts Dietz's testimony and claim on appeal that she did not hire her attorney until January 2014. The lead opinion apparently considers it important to the issue on appeal that Dietz did not hire her attorney until January 2014. *Ante* at (¶¶7, 16-17). If so, then a contract, signed and filed by Dietz, that shows that she hired the attorney fifteen months earlier is hardly a "red herring." *Ante* at n.6.

unsupportable finding of fact." (citations omitted)). The lead opinion concludes that there is a "more likely explanation" for these inconsistencies, *ante* at (¶22), but our role is not to reweigh the evidence or determine what is "more likely." "When, as in this case, the Commission's decision is supported by substantial evidence, it must be upheld even if we might have reached a different conclusion were we the trier of fact." *Howard Indus. Inc. v. Hardaway*, 191 So. 3d 1257, 1267 (¶27) (Miss. Ct. App. 2015), *cert. denied*, 202 So. 3d 208 (Miss. 2016) (alterations, quotation marks omitted).

¶31. Because the Commission's finding on this issue should be affirmed, there is no basis for holding that the employer/carrier are estopped from raising the statute of limitations as a defense. As the Commission correctly concluded, the case is otherwise controlled by the Mississippi Supreme Court's holding that an employer's voluntary payment of medical benefits does not toll the statute of limitations when, as in this case, no other compensation is paid. *See Speed Mech. Inc. v. Taylor*, 342 So. 2d 317, 318-19 (Miss. 1977); *accord Baker v. IGA Super Valu Food Store*, 990 So. 2d 254, 258 (¶¶8-9) (Miss. Ct. App. 2008), *cert. denied*, 994 So. 2d 186 (Miss. 2008). Dietz cites a treatise that is critical of the *Speed Mechanical* decision. John R. Bradley & Linda A. Thompson, *Mississippi Workers' Compensation* § 7:12 (2016). However, *Speed Mechanical* has not been overruled by the Supreme Court or the Legislature.

¶32. The Commission's findings of fact have sufficient support in the record, and there is no legal error in the Commission's ruling that the doctrine of equitable estoppel does not

apply to the facts it found. Accordingly, I respectfully dissent.

GRIFFIS, P.J., ISHEE AND CARLTON, JJ., JOIN THIS OPINION; FAIR, J., JOINS THIS OPINION IN PART.